UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

----------X

COLUMBIA MEMORIAL HOSPITAL,

Employer,

and

1199SEIU UNITED HEALTHCARE WORKERS EAST.

Union.

----------X

Case No. 03-CA-120636
03-CA-122557
03-CA-124333
03-CA-124803
03-CA-124816

**CHARGING PARTY 1199SEIU UNITED HEALTHCARE WORKERS EAST'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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## Introduction

On January 12, 2015, Administrative Law Judge Kenneth W. Chu correctly found, *inter alia*, that Columbia Memorial Hospital ("Respondent" or "Employer" or "Hospital") violated §§ 8(a)(1) and (3) of the Act when it issued Cindy Northrup a verbal warning ("Verbal Warning"), and then again when it suspended her ("Suspension"). The Respondent's Exceptions to that Decision are entirely without merit and should be dismissed in their entirety. Northrup's disciplines all stem from providing assistance to the Union in order to hold a Union meeting in the Employer's facility. There is absolutely no evidence in the record of Northrup or the Union engaging in any disruptive behavior during the events in question. Indeed, there is not even an allegation of any disruption whatsoever of the Employer's services. The type of assistance Northrup provided to the Union is the hallmark of protected activity. There can be no real question that this protected conduct is what motivated the Employer to discipline her. As such, there can be no clearer violation of the Act.

On December 26th, Northrup, a well-known Union activist, assisted Rosamaria Lomuscio, Vice President for 1199, to enter the facility in order to have a Union meeting in the Hospital. This is clearly protected under § 7 as it is assisting her labor organization and engaging in concerted activity. The Employer issued Northrup a Verbal Warning in retaliation for this assistance to the Union. It claimed, as it continues to do in its Exceptions, that it was enforcing its policy regarding the use of Employer-issued access cards and its strict sign-in policy. However, the undisputed fact that not a single other employee had *ever* been investigated or disciplined for either of these infractions, and the fact that there was no policy codifying this Employer's alleged unwritten policy, exposes this Employer's true anti-union motivations.

Prior to issuing the Verbal Warning, this Employer had already investigated the events of December 26th. Conveniently, surveillance footage and access card log data left no doubt that Northrup had provided Lomuscio assistance in entering the facility. However, armed with that confirmation, rather than proceeding with its Verbal Warning as one might have expected it to do, this Employer continued its "investigation" of this matter by interviewing Northrup regarding her protected activities. Given that the Employer already had a full account of the events of December 26th, there was no legitimate business purpose for these interviews. A third "interview" took place at Northrup's contractual grievance hearing. The Employer was dissatisfied with her inability to recall the precise events, and the Employer issued Northrup a five (5) day suspension, which was clearly further retaliation for her Union assistance. The Board should reject the Employer's continued insistence that this suspension was justified by its commitment to honesty. The record evidence paints the true picture – that of an anti-union Employer intent retaliating for Union support.

For all of the above reasons, it is clear that the ALJ correctly found that Respondent violated §§ 8(a)(1) and (3) of the Act by disciplining Cindy Northrup. Respondent's exceptions and arguments to the contrary are meritless, and the Board should uphold in full the ALJ's findings of fact and conclusions of law.

## Facts

On January 8, 2014, Columbia Memorial Hospital disciplined Cindy Northrup ("Northrup") for assisting Respondent 1199SEIU United Healthcare Workers East ("1199" or "Union" or "Respondent") in holding its monthly meeting sessions with bargaining unit members. While the purported reasons for this discipline were "allow[ing] an unauthorized visitor to enter the hospital premises" and "not requir[ing] the visitor to sign in," (GC.Ex. 10)[1], the record reveals that the so-called "unauthorized visitor" was Union Vice President Rosamaria Lomuscio ("Lomuscio"). But for the fact that this visitor was a Union representative, Ms. Northrup would not have been disciplined.

1199 is the exclusive representative of Professional, Service, and Technical Employees of the Employer ("Employees"). (GC.Ex. 2). The Union and the Employer have been parties to a series of collective bargaining agreements, the most recent of which is effective from January 1, 2011 through December 31, 2015 ("CBA"). (GC.Ex. 2). The CBA gives the Union access to the Hospital premises for, inter alia, holding meetings with bargaining unit members, and an arbitrator has already interpreted that access to mean that the Union is entitled to be in the

[1] Citations to the transcript are referred to as "Tr. _____." Exhibits are referred to as follows: General Counsel exhibits as "GC.Ex. ____," and Respondent exhibits as "R.Ex. _____." Citations to the January 12, 2015 Decision of Administrative Law Judge Kenneth W. Chu are referred to as "ALJ Decision p. _____, line _____." Citations to Brief of the Employer Columbia Memorial Hospital are referred to as "Respondent's Brief, p. _____."

Hospital after 8:00 p.m. Nevertheless, the Employer has frequently attempted to curtail the Union's access to the premises. (GC.Ex. 2; GC.Ex. 3).

The shifts of 1199 members at the Hospital span the full 24-hour day. Therefore, to be able to meet and confer with its members, Union's meetings must also span this 24-hour period. (Tr. 45-48). Schedule permitting, these meeting are conducted monthly. (Tr. 45). On December 19, 2013, in anticipation of one such meeting, Lomuscio called Hospital Director of Human Resources Kelly Sweeney ("Sweeney") to inform Sweeney that she would be in the hospital on December 26, after 8:00 p.m. to meet and confer with members. (Tr. 50-52, 447). Union witnesses Lomuscio and Northrup also testified to a December 24 in-person conversation between Lomuscio and Sweeney, for which Northrup was present, and during which Lomuscio again informed Sweeney of her intention to meet and confer with members in the Employer's facility after 8:00 p.m. on December 26. (Tr. 53, 212).

On December 26, 2013, Lomuscio arrived at the Hospital through the main entrance at approximately 10:25 a.m. and immediately signed in, as was her practice. (Tr. 56; GC.Ex. 5). At that time, Lomuscio was issued a sticker identifying her as a visitor, which she displayed throughout her time at the hospital on this occasion. (Tr. 68). The purpose of Lomuscio's visit was to conduct a monthly meeting with members in order to discuss ongoing issues affecting both particular members and the Union in general. (Tr. 44-45). On December 26, immediately after signing in, Lomuscio went to the Hospital's cafeteria, where she met with Union members and management Employees until approximately 7:00 p.m. (Tr. 59). Between 10:25 a.m. and 7:00 p.m., Lomuscio left and returned to the Hospital on several occasions without signing in – or being asked to sign in – a second time. (Tr. 59).

At approximately 7:00 p.m., Lomuscio, accompanied by Northrup, left the Hospital through a side entrance which exited onto Prospect Street, and the two dined at a local restaurant approximately five minutes from the Hospital. (Tr. 61, 217). At approximately 8:00 p.m., the two returned through the door from which they exited. (Tr. 61, 217, 218). In order to gain access through this door, Northrup was required to use her Employer-issued swipe card. (Tr. 62). Upon entering, the two proceeded directly to the Hospital's main lobby where they stayed, together, meeting with members, until approximately 9:15 or 9:30 p.m., at which point Northrup left. (Tr. 68, 224). Lomuscio remained in the main lobby until approximately 12:15 a.m. the following morning. (Tr. 65). In addition to displaying her Hospital-issued visitor's sticker, Lomuscio prominently displayed her 1199 identification, making clear her non-Employee status throughout her time in the Hospital. (Tr. 68).

Between her return from dinner at approximately 8:00 p.m. and her final departure at approximately 12:15 a.m., Lomuscio met with approximately 12 workers. (Tr. 70, 71). Lomuscio also briefly exchanged pleasantries with the Hospital's security guard. (Tr. 67-68, 226). Evening Supervisor Cindy Blair also observed Lomuscio in the Hospital lobby that evening, and was introduced to her by Employee and Union delegate Kim Bishop. (Tr. 226). Neither Lomuscio nor Northrup ever made any attempt to conceal their presence in the Hospital's lobby. (Tr. 64). At no time did the security guard, any member of Hospital management, or any other Hospital Employee ask Lomuscio to leave the facility, request that she sign in again, or inquire as to the purpose of her visit, her anticipated departure, or the manner in which she gained access to the facility. During the December 26th main lobby meeting, Lomuscio exited and re-entered the Hospital on two (2) occasions. On both occasions, upon her return, Bishop let Lomuscio re-enter through an otherwise locked door. (Tr. 69).

It is not surprising that Lomuscio re-entered the Hospital through the Prospect Street door, or that she remained in the main lobby without signing in a second time, since these actions were entirely consistent with the Employer's practices to this date. With regard to Hospital Employees using their access cards ("Access Cards") to let others into the Hospital, Lomuscio testified that she had been "swiped-in" that very Prospect Avenue door by Hospital management; Northrup has swiped in non-Employees in the presence of management, without incident, or even comment. (Tr. 63, 144, 223, 300-01, 309). Indeed, at the time Northrup was disciplined, the Hospital lacked a single written policy addressing the use and limits of the Employer-issued Access Cards. (Tr. 492-93). Moreover, there is no evidence on the record that the Employer ever directed non-security personnel to ensure that non-Employees sign in when re-entering (or entering for that matter) the facility.

Despite having been informed that Lomuscio would be at the Hospital throughout the day and into the evening of December 26, at approximately noon on that day, Sweeney directed Susan LoGiudice, Executive Assistant to Human Resources, to send an e-mail to all Hospital Directors that Lomuscio would be at the facility from noon until 7:00 p.m., erroneously claiming Lomuscio would limit her visit to the Cafeteria. (GC.Ex. 33). On December 27, having received a report that the Union meeting had taken place the previous evening (which could have come as no surprise as Sweeney was on notice of the meeting), Sweeney instructed Hospital Chief of Security Michael Hochman "to investigate the...situation and let [her] know how the union gained access to the lobby." (GC.Ex. 33; Tr. 514). That same day, Hochman confirmed that Northrup had used her Access Card to allow Lomuscio to enter the Hospital. (GC.Ex. 33). On December 30, Employer Vice President of Human Resources Tish Finnegan wrote Lomuscio a letter explaining that "the Union's inappropriate and unauthorized access of Columbia Memorial

Hospital's main lobby on Thursday, December 26, 2013 is currently under investigation." (GC.Ex. 6). Although Sweeney was fully aware that Northrup had let Lomuscio into the Hospital, either by lending Lomuscio her Access Card or using her Access Card directly, on the evening in question, the letter made no mention of any specific individual. (GC.Ex. 33; Tr. 515-16).

Although she was fully aware of Northrup's involvement with the December 26, 2013 Union meeting in the main lobby,[2] Sweeney directed Shanda Steenburn, Employer Director of Pharmacy, to interview Northrup regarding "an incident that had occurred on December 26th regarding an unauthorized access into the building." (Tr. 570-572). That interview occurred on January 2, 2014. During that interview, Northrup was asked how she entered the Hospital on December 26, to which she responded the Prospect door. She was also asked whether she was alone when she entered, to which she responded "I can't recall." (GC.Ex. 34; Tr. 227, 573). Dissatisfied with the results of this "investigation," Sweeney directed Steenburn to ask Northrup follow-up questions. On January 3, Steenburn asked Northrup if she "let Rosa from 1199 in the night of the 26th," to which Northrup replied, consistently, that she did not recall. (GC.Ex. 34; Tr. 229, 575). On or about January 3, immediately upon learning of Northrup's responses during these interviews, Sweeney determined that Northrup was being dishonest. (Tr. 467, 482).

On January 8th, the Employer issued Northrup a Verbal Warning for "allow[ing] an unauthorized visitor to enter the hospital premises[]" and for "not require[ing] the visitor to sign in." (GC.Ex. 10). The Employer's purported basis for this discipline has shifted. For instance, at times, the Employer has implied that Northrup was disciplined for using her Access Card to let

[2] The Employer was also well-aware that Northrup was a very active long-time Union delegate. (Tr. 551-552).

Lomuscio in, regardless of the time of day, (Tr. 558), although sharing Access Cards was a common practice at the Hospital. At other times, Sweeney has claimed that "[i]t was both. It was misuse of the Access Card, again letting an unauthorized visitor in and the time of day[.]" (Tr. 562). The Employer has also cited grave security concerns as a reason for its sudden policing of Employer-issued Access Cards, but it has failed to point to a single specific security issue or breach that required this response. The Employer has also failed to explain why, despite investigating hundreds of alleged incidents of Employee misconduct, Sweeney has never investigated an alleged instance of Employee misuse of Access Cards (Tr. 562), and why there was, as of the December 26 Union meeting, no written policy regarding their use. With regard to Northrup's failure to require Lomuscio to sign in, it is undisputed that none of the other Employees – including security and managerial Employees – who observed Lomuscio in the main lobby on December 26 and also failed to require her to sign in were disciplined for this "infraction." Finally, there is absolutely no evidence that anyone from the Employer ever instructed Northrup – or any other bargaining unit Employee – that it was her responsibility to insure that visitors sign in. (Tr. 565).

On January 8, the Union grieved Northrup's discipline under the CBA's grievance procedure. (Tr. 233; GC.Ex. 11). Pursuant to this procedure, on January 28, the parties held a grievance hearing. (Tr. 472). Immediately prior to the grievance hearing, Sweeney permitted Lomuscio and Union Organizer Tim Rodgers to view video footage, which showed, inter alia, Northrup and Lomuscio entering through the Prospect Avenue entrance on the evening of December 26. However, Sweeney would not permit Northrup to view the same footage. (Tr. 90, 244, 474). Sweeney testified that she did not permit Northrup to view the video because she thought "there was [*sic*] enough people to view the video." (Tr. 474-75). While Northrup was

asked whether she allowed Lomuscio to enter the building on December 26, Northrup did not respond. (Tr. 241, 318). Moreover, although it is the Employer's standard disciplinary practice to provide the Union with the policies it alleges to have been violated, at no time did the Employer provide, or cite to, a written policy it alleged Northrup to have violated. (Tr. 94, 238-40).

On January 31, the Employer denied the Union's grievance reasoning that Northrup had "allowed an unauthorized visitor to enter the hospital premises. [Northrup] stated that she could not recall doing so." (GC.Ex. 16). The Union has submitted a demand for arbitration, pursuant to the CBA's arbitration procedure, and the parties are awaiting arbitrator selection and hearing scheduling. (Tr. 98).

Although the Employer had confirmed by December 30, 2013 that on December 26th Northrup had come in the Prospect Avenue door with Lomuscio (Tr. 555), and thus that Northrup was not being forthcoming, it waited until February 11, 2014 to issue Northrup a five (5) day Suspension for "engag[ing] in dishonest behavior by not being forthcoming to questions asked by the Director of Pharmacy and the Director of Human Resources in two separate forums[,]" noting the dates of the alleged "infractions" to be January 2, 3, and 28, which were the dates of Northrup's two (2) investigatory interviews and third step grievance hearing. (GC.Ex. 20; Tr. 253-54). On February 21, 2014, the Union grieved Northrup's Suspension pursuant to the CBA's grievance procedure. (GC.Ex. 21). The Employer denied the Union's grievance, and the Union has submitted a demand for arbitration, pursuant to the CBA's arbitration procedure. The parties are awaiting the process of arbitrator selection and hearing scheduling. (Tr. 256).

Northrup's discipline for alleged dishonesty is distinguishable from other instances in which the Employer disciplined Employees for dishonesty. In all such other instances, the Employees were accused of falsifying time sheet records, and thus of committing theft, or risked possible patient harm (R.Ex. 11). No Employee has been independently disciplined for alleged dishonesty during either an investigatory interview or a grievance meeting or hearing.

Prior to January 8, 2013, Northrup had never been disciplined by the Employer for any reason. (Tr. 255).

## Argument

### POINT I.
### THE ALJ CORRECTLY CONCLUDED THAT COLUMBIA MEMORIAL HOSPITAL VIOLATED §§ 8(a)(1) AND (3) OF THE ACT WHEN IT DISCIPLINED CINDY NORTHRUP.

Columbia Memorial Hospital violated §§ 8(a)(1) and (3) of the Act when, as a result of Northrup's protected § 7 activity, it issued her a Verbal Warning in January of 2014 and suspended her in February of 2014. Sections 8(a)(1) and (3) of the Act state:

> It shall be an unfair labor practice for an employer-
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7
>
> ...
>
> (3) by discrimination in regard to ...any term or condition of employment to encourage or discourage membership in any labor organization[.]

29 U.S.C. §§ 158(a)(1) and (3). The ALJ correctly applied the seminal test articulated in Wright Line, 251 NLRB 1083 (1980) to analyze whether this Employer took adverse action against Northrup for engaging in § 7 activity, ALJ Decision, p. 9-10. Under Wright Line, the General Counsel "has the burden of establishing a prima facie case that the employee's protected conduct

was a substantial or motivating factor in the . . . adverse action taken by the employer." Kidde, Inc., 294 NLRB 840 (1989). In order to establish such a prima facie case, the General Counsel must show (1) the existence of protected activity; (2) knowledge of that activity by the employer; and (3) union animus. CA Almond Growers Exch., 353 NLRB 50 (2008). An employer may rebut that prima facie case by showing that prohibited motivations played no part in its actions, see NKC of Am., Inc., 291 NLRB 683, 683 n.4 (1988), or by demonstrating that the same personnel action would have taken place for legitimate reasons, regardless of the employee's protected activity. See Am. Armored Car, 339 NLRB 103 (2001).

As illustrated below, the ALJ correctly found that the General Counsel clearly established a prima facie case to support an inference that both Northrup's disciplines were motivated by her protected conduct. Because the Employer was unable to rebut this prima facie case, the ALJ's finding that the Employer violated the Act both when it issued Northrup a Verbal Warning and when it suspended her was fully supported by the record evidence.

### A. THE GENERAL COUNSEL ESTABLISHED A PRIMA FACIE CASE THAT NORTHRUP'S VERBAL WARNING VIOLATED THE ACT.

On December 26, 2013, at approximately 8:00 p.m., Northrup, a long-time Union delegate, used her Employer-issued Access Card to allow Lomuscio to enter the Hospital so that the two could meet and confer with members in the facility's main lobby. It is undisputed that, while Lomuscio had signed the Employer's visitor sign-in sheet at approximately 10:25 a.m., she did not sign in again when she returned that evening. On January 8, 2014, the Employer issued Northrup a Verbal Warning for using her Access Card to provide Lomuscio entry and for not requiring Lomuscio to re-sign the sign-in sheet. As discussed below, the ALJ correctly found

that the General Counsel has established a prima facie case that Employer's conduct violated §§ 8(a)(1) and (3) of the Act. See ALJ Decision, p. 10, lines 11-13.

1. On the evening of December 26, 2013, Northrup engaged in protected § 7 activity.

Section 7 of the Act gives "Employees . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. § 157. Indeed, it is axiomatic that when employees meet to discuss terms and conditions of employment – precisely what Northrup and other Employees of Columbia Memorial Hospital were doing on the evening of December 26th – it is protected activity under § 7 of the Act. See, e.g., Abramson, LLC, 345 NLRB 171, 173 (2005) (noting that where employees concertedly band together to seek an improvement in terms and conditions of employment they are engaged in § 7 activity). Thus, the ALJ correctly concluded that Northrup's activities on the evening of December 26 were clearly concerted protected activities under the Act. See ALJ Decision, p. 10, lines 25-40.

2. The Employer had knowledge of Northrup's Union activity.

The ALJ correctly found that the Employer was aware of Northrup's December 26th Union activity. See ALJ Decision, p. 10, line 27 ("There is also no dispute that Respondent had knowledge that the union was meeting with members for the entire day and night. Although Sweeney disagreed with Lomuscio of the union's right to access the facility after 8 p.m., Sweeney knew that Lomuscio and other union delegates intended to continue meeting after 8 p.m.").

3. The Employer's conduct was motivated by Union animus when it issued her a Verbal Warning.

The ALJ correctly found that the Employer's decision to issue Northrup a Verbal Warning was motivated by Union animus. See ALJ Decision, p. 10, line 41-43. Evidence suggesting that an employer's explanation for its action is pretextual has been used to support a showing of union animus. See, e.g., Active Transp., 296 NLRB 431, 432 (1989) (noting that pretextual reasons are "indicative of illegal motivation"); HS Healthcare, 295 NLRB 17 (1989) (shifting reason for action indicates animus necessary for prima facie case). The finding of animus was supported by the record by, *inter alia*, "the timing of the discipline issued to Northrup, shortly after she engaged in open union activity on December 26, 2013[.]" ALJ Decision, p. 10, lines 36-38.

Respondent erroneously claims that the ALJ relied solely on the timing of the Northrup Discipline to evidence that the Hospital was motivated by discriminatory animus. See Respondent's Brief, p. 16. This is a blatant misrepresentation of the ALJ's Decision. The ALJ clearly and correctly explains the legal standard by which the General Counsel must establish the "prima facie showing that Northrup's union activity was a motiving factor in Respondent's decision to discipline her." ALJ Decision, p. 10, lines 12-14. The ALJ explained that:

> First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware of the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employees [sic] protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.

ALJ Decision, p. 10, lines17-24. The ALJ went on to analyze the above factors, and conclude that "[i]n addition, I find that the timing of the discipline issued to Northrup, shortly after she engaged in open union activity on December 26, 2013, supports an inference that the Respondent's discipline was motivated by Northrup's union activity." ALJ Decision, p. 10, lines 36-39. As such, it was not "timing alone" that established the hospital was motivated by discriminatory animus, as Respondent would like the Board to conclude. Rather, it was timing, considered in conjunction with the other requisite factors. Indeed, the ALJ correctly asserted that

> [d]iscriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities; the timing between discovery of the employees' protected activities and the discipline; evidence that the employer's asserted reason for the employees' discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless[.]

ALJ Decision, p. 11, lines 9-21 (internal citations omitted). The ALJ then went on to note that the record failed to show Respondent ever disciplined another employee for improper use of an Access Card, thus demonstrating the Employer's disparate treatment of Northrup; and the Employer's lack of objective standards in place for the use of Access Cards, thus demonstrating that the Employer's alleged emphasis on safety and security was illogical and therefore pretextual. See ALJ Decision, p. 11, lines 26-35. Therefore, Respondent's claim that the ALJ relied on any single factor is untrue.

## B. THE GENERAL COUNSEL ESTABLISHED A PRIMA FACIE CASE THAT CINDY NORTHRUP'S SUSPENSION VIOLATED THE ACT.

On February 11, 2014, Columbia Memorial Hospital issued Northrup a five (5) day Suspension[3] alleging that she "engaged in dishonest behavior by not being forthcoming to questions asked by the Director of Pharmacy and the Director of Human Resources in two separate forums[]" on January 2nd, 3rd, and 28th. January 2nd and 3rd were the two days in which the Director of Pharmacy questioned Northrup as part of the Employer's "investigation" of the December 26th Union meeting. January 28th was the date of Northrup's grievance hearing for her January 8th Verbal Warning regarding assisting the Union on December 26th. The ALJ correctly concluded that the General Counsel established a prima facie case that Northrup's Suspension, like the Verbal Warning, violated §§ 8(a)(1) and (3) of the Act. See ALJ Decision, p. 10, lines 11-14.

The Board should reject Respondent's argument that Northrup's conduct lost its § 7 protection because she was allegedly "dishonest in regards to the Hospital's investigation that was the basis for her discipline." Respondent Brief, p. 13. Respondents cite a single case for the proposition that "in certain circumstances, an employee may lose the protection of the Act by engaging in conduct that is deliberately deceptive or maliciously false where there is no necessary link between the deception or falsification and the protected conduct." Encino Hospital Medical Center, 360 NLRB No. 52, *3 (2014). However, there can be no real dispute that, as discussed above, Northrup's December 26 conduct was protected activity. It necessarily follows then, that the investigation of that protected activity and the protected activity itself are

[3] Because Northrup was told to end her February 11th shift prior to completion, and then her five (5) day Suspension commenced the following day, her actual Suspension was a total of five (5) days and a portion of her February 11, 2014 shift.

obviously linked, such that Northrup's conduct did not lose its protection under the Board's reasoning in Encino. As such, the Board should affirm the ALJ's finding that Northup's conduct was protected under the Act.

The first two instances of Northrup's alleged misconduct occurred during, and as the direct result of, the Employer's investigation, which was tainted by Union animus, and, therefore, cannot serve as the basis for discipline. It was Northrup's December 26th protected concerted activity, and her assistance to the Union, which led to the January 2nd and 3rd investigatory interviews. These investigatory interviews, in turn, led to her grievance hearing on January 28th. And, both the interviews and the grievance hearing served as the basis for her unlawful Suspension.

On or about January 2, 2014, Sweeney instructed Steenburn, Northrup's supervisor, to investigate Northrup's involvement in Lomuscio's entry into the Hospital. However, given that, by December 27, 2013, Sweeney had already confirmed that Northrup had assisted Lomuscio in getting into the Hospital, there was nothing further to investigate. As such, the so-called "investigation" was really a thinly veiled attempt by Hospital management to elicit certain "damming" admissions from Northrup regarding her § 7 protected activity.

On January 2nd, Steenburn interviewed Northrup about the December 26th meeting. At that time, Northrup admitted that she had come in through the Prospect door, and, when asked if she "was alone," she responded that she could not recall. After learning the results of that interview, Sweeney concluded that the questions asked were not specific enough. At Sweeney's instruction, on January 3rd, Steenburn again interviewed Northrup. When asked if she let anyone in with her on the side door, she answered again that she could not recall. Northrup testified at the hearing that this was a truthful response. Notably, although Sweeney had already

concluded, prior to January 8th, that Northrup had been dishonest, this alleged dishonesty was not included in the January 8th Verbal Warning.

Having already concluded that Northrup had been dishonest on both January 2nd and 3rd, the Employer claims it asked Northrup again on January 28th if she had allowed Lomuscio to enter the Hospital. The Employer claims that Northrup again stated that she did not recall. Although the Union disputes that Northrup was asked – and answered – this question on January 28th, even accepting Respondent's version of events, a statement made in one's defense at a grievance hearing cannot serve as the basis of discipline.

Furthermore, if the goal of the January 2nd or 3rd interviews or the January 28 hearing was actually to elicit facts in order to uncover the truth about what occurred on December 26th, one would expect that the Employer would have confronted Northrup with the video showing that she had used her Access Card to let Lomuscio enter the Hospital. To the contrary, however, the Employer denied her the opportunity to view that video.

This constellation of facts support the ALJ's conclusion that "[t]he record as a whole supports the fact that the Respondent has an intense interest as to whether in the Union was intending to meet after 8 p.m. on December 26 and [the ALJ] simply do[es] not believe that Sweeney disciplined Northrup for being dishonest during her investigatory interviews." ALJ Decision, p. 11, lines 23-26.

Northrup's alleged dishonesty, and thus her resulting Suspension, stemmed from the Employer's investigation – an improper investigation pervasively tainted with Union animus. However, misconduct triggered by and elicited during an improper investigation cannot be a lawful basis for discipline. See Preferred Transp. Inc., 339 NLRB 1 (2003) (false statements made during a tainted investigation cannot create good cause for discharge of employee).

Similarly, the second part of Northrup's alleged misconduct occurred during a grievance hearing, and, therefore, also cannot serve as the basis for discipline. The filing of grievances is unquestionably protected, concerted activity. See Aluminum Co. of Am., 338 NLRB 20, 21 (2002) ("There is no question that [employee's] . . . participation in the filing of grievances [was] protected concerted activity."). If grievance filing is protected, it follows that grievance processing must be protected as well. As such, statements made in one's defense at a grievance hearing must also be protected. The grievance hearing is the very heart of the grievance mechanism, during which a grievant may make arguments in his or her defense to persuade the employer to rescind the discipline. Therefore, statements made during such hearings are protected by § 7 and cannot serve as a basis for discipline.

## POINT II.
## THE ALJ CORRECTLY FOUND THAT BUT FOR NORTHRUP'S PROTECTED ACTIVITY THE EMPLOYER WOULD NOT HAVE DISCIPLINED HER.

Once the General Counsel has presented its prima facie case "the employer can avoid liability under the Act by proving by a preponderance of the evidence an affirmative defense that it would have taken the same action even if the unlawful motives had not existed." Kidde, Inc., 294 NLRB at 849. The ALJ properly rejected Respondent's defense that "Northrup was given a verbal warning because of her unauthorized use of her access cared in allowing Lomuscio entry to the premise (sic)." ALJ Decision, p. 11, lines 3-5. As illustrated below, the Respondent failed to successfully claim this affirmative defense since its purported legitimate business reasons for giving Northrup a Verbal Warning are simply not credible. As such, the Respondent's claim that it would have disciplined Northrup regardless of her protected activity should be rejected. Respondent's Brief, p. 22.

## A. THE EMPLOYER'S SECURITY CONCERNS ARE NOT A LEGITIMATE BUSINESS REASON FOR ISSUING NORTHRUP A VERBAL WARNING.

The Employer issued Northrup a Verbal Warning on January 8, 2013 for "allow[ing] an unauthorized visitor to enter the hospital premises," and for "not require[ing] the visitor to sign in." The Employer claims to have issued this discipline – the first of its kind to any Columbia Memorial Employee – primarily because of security concerns. However, an analysis of the evidence reveals that such "concerns" are in fact thinly-veiled pretexts for an unlawfully-motivated discipline.

First, on two separate occasions – both a week before the December 26th meeting and again two days prior – Lomuscio informed the Employer that she intended to meet and confer with members in the main lobby on the evening of December 26th. Thus, Employer representative Sweeney was put on notice that Lomuscio intended to be in the Hospital. Although the Employer claimed that the CBA did not authorize Lomuscio to be in the facility at that time, there is no evidence in the record that Sweeney told security, or any other member of Hospital management, that Lomuscio should be removed, despite knowing exactly where she would be and when she would be there. If having an "unauthorized" person, i.e., Lomuscio, in the Hospital was, in fact, a security threat, a reasonable course of action would have been to have her removed. The Hospital, however, did no such thing.

To the contrary, several members of Hospital management, as well as security guards, observed Lomuscio in the main lobby until 12:30 a.m. on December 27th. Lomuscio never concealed her presence, and she displayed her 1199 identification and Employer-issued visitor badge throughout her time in the Hospital, making her non-Employee status eminently clear. No member of management ever asked her how she gained access to the Hospital. No member of

management ever asked her whether she signed in. And, most telling, no member of management ever asked her to leave. To the contrary, the Hospital security guard exchanged pleasantries with Lomuscio – hardly an expected response to a "security threat."

As the ALJ correctly observes, the record contains evidence that Employees frequently used their Access Cards to swipe others – including non-Employees – into the facility, but no other employee, save Northrup, was ever disciplined for doing so. See ALJ Decision, p. 11, lines 26-30. Inconsistent and disparate treatment of employees is a hallmark of pretext in the context of a discriminatory discipline in violation of the Act. See, e.g., Carpenters Health & Welfare Fund, 327 NLRB 262, 265 (1998) (finding evidence of union animus where employer investigated telephone habits only of vocal union supporter). Lomuscio, Rodgers, and Northrup all testified that sharing Access Cards among Employees and non-Employees is common practice at the Employer. However, no Employee has ever been disciplined as a result of his or her use of the Access Cards or for his or her alleged failure to "require [a] visitor to sign in."[4] Indeed, although the Employer has investigated hundreds of alleged instances of Employee misconduct, not one has implicated either of these issues. This disparate treatment starkly illustrates the pretextual nature of the Employer's justification of Northrup's discipline.

Moreover, as of the date that Northrup used her Access Card to provide Lomuscio entry to the Hospital, there was no written policy regarding their use, and Northrup testified that she had not even received any verbal orientation regarding their use and limits. See ALJ Decision, p. 10, Lines 30-33. If, as the Employer claims, the use of Access Cards was so critical to the maintenance of security such that a single alleged misuse would warrant disciplining an

[4] Indeed, there is no evidence that Northrup, a pharmacist, or any other Employee, has ever been instructed that it is their responsibility to require a non-Employee to sign into the facility.

Employee with no disciplinary record, one would expect there to be some written or standardized oral guidance on this matter. See, e.g., Cadence Innovation, LLC, 353 NLRB 703, 713 (2009) (noting that "unwritten policies are ready tools for discrimination and are suspect"); Planned Building Services, 347 NLRB 670, 715 (2007) (the fact that a putative policy is unwritten lends support to a finding that it is pretextual).

While no employer should be forced to wait for a serious security breach before taking reasonable measures to address perceived security vulnerabilities, reasonable measures cannot include disciplining an employee in retaliation for assisting her union. It stretches the imagination to conclude that with such competent, well-trained security personnel, and a human resources representative who has investigated hundreds of allegations of Employee misconduct (some of which have surely implicated security, given the importance of security to the Hospital), the Hospital had never once considered that Access Cards, which allow unbridled entry to many entrances of the Hospital throughout day or night, could be a potential security concern. Raising this concern now to justify disciplining an Employee for using her Access Card to let her Union Representative into the facility is the pinnacle of pretext.

The Hospital seeks to justify its unlawful discipline, claiming that "it had a reasonable belief that Ms. Northrup engaged in misconduct, and that such misconduct could lead to safety and security concerns[.] Respondent's Brief, p. 23. First, it is noteworthy, as discussed above, the record establishes that the "misconduct" – Northrup using her access card to allow a Union representative into the building for a Union meeting – is conduct that has been widespread and tolerated by management without discipline or even investigation in the past. Certainly, the Board should reject any notion that allowing a known Union official access to the Employer's facility under any circumstances, can be likened to the life-threatening misconduct presented in

GHR Energy, as discussed below. Indeed, here, Northrup's alleged "misconduct" was actually intrinsically related to the protected activity of holding a Union meeting in the lobby of the hospital. Respondent's reliance on GHR Energy for the notion that its "reasonable belief" that Northrup' misconduct "endangered other employees" is striking because the facts of that case are so dramatically distinguishable from those in this case. In that case, notorious Union supporters were discharged for openly attacking another employee by throwing glass bottles filled with kerosene from an elevated platform. GHR Energy Corp., 294 NLRB 1011, 1013 (1989). While the Board held that the respondent in that case demonstrated "a reasonable basis for believing that [the employees] had engaged misconduct with a high likelihood of injuring other employees and of damaging plant equipment" and that the "potentially catastrophic consequences of throwing kerosene filled bottle would have provoked at least a suspension of any employee irrespective of any union animus," it also found that there had been "no showing that respondent ever failed to take similar disciplinary action against any other employee accused of egregious misconduct." Id. at 1014. But here, in striking contrast to GHR Energy, there is undisputed evidence that this Employer has never taken "similar disciplinary action against an employee" for engaging in the "misconduct" for which it disciplined Northrup. As such, Respondent's arguments based on this authority should be rejected.

### B. THE EMPLOYER'S CLAIM THAT NORTHRUP WAS SUSPENDED BECAUSE THE HEALTHCARE INDUSTRY VALUES HONESTY IS PRETEXT.

The Board should reject Respondent's claims that it was justified in suspending Northrup because of its allegedly "reasonable belief" that she was dishonest. Respondent's Brief, p. 25-26. What the record revealed, however, is that the Employer values honesty specifically with

regard to patient care matters, an area in which Northup had an indisputably impeccable record and reputation. For instance, Steenburn, testified that:

> honesty plays a very big part...especially in Healthcare;...especially in the field...of medication usage. ... I mean it could be the difference between life and death or a serious mistake; so what we do is encourage people, if you make a mistake, you know, tell us about it; because we want to prevent something further from happening, whether it be a security issue or a mediation issue or anything[.]

(Tr. 583). Because the evidence shows that the Employer values honesty specifically with regard to patient care, such commitment to honesty cannot justify a Suspension for an infraction totally unrelated to patient care.

The Employer's disparate treatment of Northrup demonstrates it had no legitimate business reason for her Suspension. It is so well-established as to be axiomatic that inconsistent and disparate treatment of employees is a hallmark of pretext in the context of discriminatory discipline. As with the Verbal Warning, with regard to Northrup's Suspension, she was clearly treated differently than other similarly-situated Employees. Indeed, there is no evidence in the record that any other Employee has ever been disciplined for "dishonesty" during the course of an investigatory interview or grievance hearing. The Respondent's claim that it actually imposed on Ms. Northrup a lesser discipline than on other employees ignores that obvious fact that the other employees at issue were not similarly situated to Northrup. See Respondent's Brief, p. 20. While the Employer provided four examples of dishonesty-related disciplines, they all involved falsifying timesheets, resulting in theft from the Employer, or patient care issues, which could expose the Hospital to serious liability or worse, actual patient harm. Those disciplines are clearly distinguishable from Northrup's. Indeed, the ALJ correctly observed that "the Respondent has produced no evidence of other employees ...being 'dishonest' by failing to

recall or refusing to identify someone...No examples were proffered by the Respondent of comparative disciplines of employees charged with dishonesty for refusing to provide an answer during an investigatory interview." ALJ Decision, p. 12, lines 8-14.

Respondent cites PHC-ELKO for the proposition that an employer should not have to "show a prior instance of similar misconduct" as it would "preclude [it] from disciplining an unprecedented wrong, irrespective of how egregious that wrong might be." PHC-ELKO, Inc., 347 NLRB 1425, 1427 (2006); Respondent's Brief, p. 28. However, Respondent's suggestion that any of Northrup's conduct at issue in this case – either her allowing Lomuscio's entry into the facility or her conduct during the investigation of that incident – is in any way novel or unprecedented has no support in the record. It is undisputed that employees frequently allow access to others with their employer issued access card, as Northrup did for Lomuscio on December 26, 2013. It is equally undisputed that despite Sweeney's hundreds of investigations, she has never even investigated this so-called "misconduct," with the exception of Northrup. In addition, with all these investigations, and presumably employee interviews, the Employer failed to show a single discipline solely for alleged dishonesty during an investigation. Under these circumstances, was entirely appropriate for the ALJ to rely on lack of similar disciplines to support a finding that the posited reasons for Northrup's two disciplines were pretextual.

While this Employer may place a high premium on the candor of its employees, that value cannot be used as a pretext to a discipline for activity protected under § 7 of the Act. The record establishes that that is precisely what Respondent did in this case.

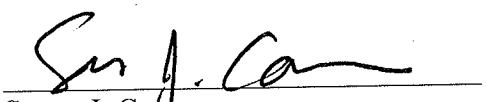
For these reasons, the Board should affirm the ALJ's rulings.

## Conclusion

For all of the above reasons, Respondent has clearly violated Sections 8(a)(1) and (3) of the Act by disciplining Cindy Northrup. Respondent's exceptions and arguments to the contrary are meritless, and the Board should uphold in full the ALJ's findings of fact and conclusions of law.

Dated: February 23, 2015
New York, New York

LEVY RATNER, P.C.



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

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COLUMBIA MEMORIAL HOSPITAL,

Employer,

and

1199SEIU UNITED HEALTHCARE WORKERS EAST.

Union.

----------X

**AFFIDAVIT OF SERVICE**

Case No. 03-CA-120636
03-CA-122557
03-CA-124333
03-CA-124803
03-CA-124816

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JOHN O. TORRES-ROJAS, being duly sworn state the following:

I am not a party to this action, am over 18 years of age and reside at New York, NY.

**AFFIDAVIT OF SERVICE BY FIRST-CLASS MAIL**

On February 23, 2015, I served the within Charging Party 1199SEIU United Healthcare Workers East's Answering Brief to Respondent's Exceptions by electronic mail to each of the following persons at the below addresses set forth after each name below:

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JOHN O. TORRES-ROJAS

Sworn to before me this
23rd day of February, 2015

NOTARY PUBLIC

CHERYL C CUNJIE
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COMM. EXP. 4.11.2015